No. 21-3205
(consolidated with No. 21-3068, 21-3243 & 22-1158)

In the

United States Court of Appeals

for the

Third Circuit

ELECTRIC POWER SUPPLY ASSOCIATION,

Petitioner,

– v. –

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On petition for review of orders of the
Federal Energy Regulatory Commission

BRIEF OF PETITIONER
ELECTRIC POWER SUPPLY ASSOCIATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and L.A.R. 26.1, Petitioner Electric Power Supply Association (EPSA) hereby submits the following disclosure statement in the above-captioned case:

EPSA is not a public company, has no parent corporation, and no publicly held corporation owns 10% or more of its stock. No publicly owned corporation not a party to the appeal has a financial interest in the outcome of the litigation.

/s/ *Paul W. Hughes*

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INTRODUCTION

In 2018, the Federal Energy Regulatory Commission (FERC)—by a majority vote of its five Commissioners—determined that in order for the regional electric capacity market administered by PJM Interconnection, LLC (PJM) to comply with the Federal Power Act's (FPA) requirement of "just and reasonable" rates (16 U.S.C. §§ 824d(a), 824e(a)), that market had to be protected from the pernicious effects of state subsidies for state-favored power generators through a meaningful Minimum Offer Price Rule (MOPR).

Just three years later, however, the agency deadlocked 2-2 and allowed a contrary proposal to take effect by operation of law. This change undid what FERC had previously required with respect to the MOPR, not only in the 2018 order but in orders going back over a decade. The result was an abrupt reversal of course effected not by a majority vote, but by a *failure* of the agency to act.

This action—or, more precisely, inaction—is unlawful, and must be set aside. Not only did FERC itself fail to proffer *any* explanation for its result (evenly split as the agency was), but even the individual Commissioners supporting the agency's about-face did not adequately respond to various parties' invocation of reliance interests engendered by the prior, more vigorous versions of the MOPR. And substantively, the new policy FERC

has allowed to take effect violates the FPA's prohibition on "unduly discriminatory" rates (16 U.S.C. § 824e(a))—which, properly understood, obligates FERC to consider whether the interstate markets it administers improperly permit one State to project its policy preferences into other sovereign States.

One way or another, FERC's silent acceptance of the "Focused MOPR"—PJM's euphemism for a MOPR that does nothing to mitigate the price effects of state-subsidized generation resources—cannot stand.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this case pursuant to 16 U.S.C. § 825*l*, which provides for judicial review in this Court of orders issued by the Federal Energy Regulatory Commission under the Federal Power Act. Specifically, FERC issued a notice on November 29, 2021 that it was divided two against two as to various parties' requests for rehearing, an action explicitly made reviewable by 16 U.S.C. § 824d(g)(2). PJM is headquartered in this circuit, and it operates the electric transmission system, and administers markets, within this circuit.

ISSUES PRESENTED FOR REVIEW

1. Must the Commission's default acceptance of the Focused MOPR, resulting from a 2-2 deadlock among the Commissioners, be set aside under the Administrative Procedure Act because the agency has provided no reasoned explanation for its action? *See* EPSA Reh'g 2-3, 9-20 (JA __-__, __-__).

2. Even if the statements of the supporting Commissioners are deemed attributable to the Commission itself for purposes of the APA's reasoned decisionmaking requirement, did FERC act arbitrarily and capriciously by abruptly changing course without adequately responding to reliance interests engendered by its prior decisions—specifically, the decisions adopting the Expanded MOPR? *See* EPSA Reh'g 4, 37-40 (JA __, __-__).

3. Did FERC violate the Federal Power Act's prohibition on unduly discriminatory rates (16 U.S.C. § 824e(a)) by accepting the Focused MOPR, which permits individual States to project their own policy preferences into other sovereign States by means of the FERC-regulated capacity markets? *See* EPSA Reh'g 5, 40-47 (JA __, __-__).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. Petitioner is not aware of any other case or proceeding, apart from the consolidated petitions presented here, that is related to this case for purposes of L.A.R. 28.1(a)(2). However, there are a number of proceedings consolidated in the Seventh Circuit that challenge FERC's adoption of the Expanded MOPR—that is, the rate regime that the challenged action here rescinded and replaced. *See Ill. Commerce Comm'n v. FERC*, Nos. 20-1645 *et al.* (7th Cir.).

STATEMENT

A. PJM's capacity market.

This case concerns the regional market for capacity administered by PJM Interconnection LLC (PJM). PJM is one of several regional transmission organizations and independent system operators, which are independent bodies that operate regional transmission grids and administer organized markets for electricity products within those grids, subject to FERC's regulatory oversight. *See generally N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 79 (3d Cir. 2014) (*NJBPU*) (discussing the role of regional transmission organizations). PJM's territory is "a vast region covering thirteen states and the District of Columbia." *Id.* at 79; *see* PJM, *Who We Are*, https://perma.cc/C4RM-DE2Q.[1]

The PJM market at issue here is the capacity market. "'Capacity' is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties—generally, generators—who can either produce more or consume less when required." *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477,

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[1] The fourteen jurisdictions included within PJM in whole or in part are Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia. *Id.*

479 (D.C. Cir. 2009). Thus, "[u]nlike the electricity market, in which generators sell actual power to retailers, the capacity market trades in the *future* supply of electrical power." *TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 114 (D.C. Cir. 2013).

PJM's capacity market is run using annual auctions, which are designed to be "held three years in advance of when the capacity offered at the auction will be needed." *NJBPU*, 744 F.3d at 84; *see also Del. Div. of Pub. Advocate v. FERC*, 3 F.4th 461, 463 (D.C. Cir. 2021) ("To establish the capacity market, PJM conducts a yearly auction in which electricity suppliers submit offers to be available to provide capacity during a one-year period, three years in the future.").

As the D.C. Circuit has explained it:

> The auction works as follows. Resource owners offer to sell a set amount of capacity at a specific rate. PJM accepts offers, beginning with the offer at the lowest rate, until the system has sufficient capacity to meet projected demand. Regardless of the resource owner's offer price, PJM purchases all capacity at the rate of the highest accepted bid—the market clearing price. [U]tilities then pay for their assigned share of capacity.

Adv. Energy Mgmt. Alliance v. FERC, 860 F.3d 656, 659-660 (D.C. Cir. 2017). In other words, "[s]uppliers offer a specific amount of capacity at a specific price and together the offers comprise the auction's 'supply curve.' The auction uses an administratively-set 'demand curve' … which represents the prices consumers should pay for varying quantities of capacity."

Del. Div. of Pub. Advocate, 3 F.4th at 463. "The intersection of the two curves dictates the amount of capacity committed and the price suppliers are paid." *Id.*

This auction-based system for compensating generators for capacity—essentially, their availability to produce power when called upon in the future—plays a crucial role in ensuring reliable power generation. The sale of capacity commitments ensures that that sufficient generation resources will be available to generate power "during periods of peak demand." *NJBPU*, 744 F.3d at 82. And the resulting prices send essential signals to the market about the future demand for electricity. High capacity prices signal that the construction of new power plants will be economically viable; low capacity prices may encourage existing facilities to retire. *Id.* at 84; *see also T.C. Ravenswood*, 741 F.3d at 114 (capacity "market design encourages desirable investment by signaling the need for more generation and by enabling power generators to recoup their costs in the capacity market," thus "ensur[ing] that power generators have sufficient incentives to build new power plants when the grid needs additional supply" and preventing "consumers" from being "le[ft] in the dark").

B. Minimum offer price rules.

Like any market, PJM's capacity market is potentially subject to distortions, and PJM has adopted market rules to address such issues. In particular, since 2006 PJM has utilized various formulations of an offer floor mechanism—the minimum offer price rule, or MOPR—to prevent below-cost offers by capacity suppliers from skewing the auction clearing price. *See, e.g.*, Glick Statement ¶¶ 24-28 (JA __-__) (tracing iterations of PJM's MOPR); Danly Statement ¶¶ 25-33 (JA __-__) (same); *NJBPU*, 744 F.3d at 79 (The MOPR is "designed to curb the ability of market participants to distort wholesale prices through the exercise of market power.").

In short, where it applies, the MOPR provides "that offers for the sale of capacity in the PJM markets at artificially low prices" will "be 'mitigated,' or raised to a competitive level, based on their costs." *NJBPU*, 744 F.3d at 79; *see also id.* at 85 ("To counteract … manipulation of the market, the MOPR seeks to identify uneconomic offers and 'mitigate' them by raising them to a price that more accurately approximates their net costs."). Because those uneconomic offers are raised to an economically efficient level, they are prevented from distorting the auction clearing price and the resulting price signals.

As originally formulated, the MOPR was focused on below-cost bids by sellers that either were, or were affiliated with, net buyers of capacity.

See Danly Statement ¶¶ 25-27 (JA __); *cf. NJBPU*, 744 F.3d at 85 (explaining that "[t]he exercise of buyer market power is possible in part because many utility companies are both buyers and sellers in the capacity auctions."). Over time, however, the MOPR has been expanded to cover other instances in which a generator's offer may not reflect its full going-forward costs—most notably, where the generator is subsidized and thus has an incentive to offer below its costs.

Most recently, after finding the more limited MOPR then in place to be unjust and unreasonable in 2018, FERC issued an order in 2019 requiring PJM to adopt what is often referred to as the "Expanded MOPR," which applied offer-floor mitigation to both "(1) new natural-gas-fired resources; and (2) resources that receive or are eligible to receive State Subsidies." Danly Statement ¶ 38 (JA __); *see Calpine Corp.*, 163 FERC ¶ 61,236 at PP 150-156 (2018) (finding that prior MOPR resulted in unjust and unreasonable rates for failure to mitigate the bids of state-supported resources); *Calpine Corp.*, 169 FERC ¶ 61,239 at P 2 (2019) (ordering PJM to submit a replacement rate that "extends the MOPR to include both new and existing resources, internal and external, that receive, or are entitled to receive, certain out-of-market payments" from States); *see also* Danly Statement ¶ 43 (JA __) ("[T]he Expanded MOPR tests for whether a state-subsidized Capacity Resource offer is below a competitive level and—if it is—resets the offer

to a higher level that excludes the economic benefit of any state support or subsidy.") (quoting PJM Transmittal 8 (JA __)).

As FERC explained at the time, a PJM tariff that does not extend the MOPR to state-supported resources—and thus fails to mitigate the below-cost capacity auction bids of these generators—"is unjust and unreasonable and unduly discriminatory," because:

> [i]t fails to protect the integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market [state] support to keep existing uneconomic resources in operation, or to support the uneconomic entry of new resources … . *The resulting price distortions compromise the capacity market's integrity*. In addition, these price distortions create significant uncertainty, which may further compromise the market, because investors cannot predict whether their capital will be competing against resources that are offering into the market based on actual costs or on state subsidies. Ultimately, the problems with PJM's existing Tariff result in unjust and unreasonable rates, terms, and conditions of service.

Calpine Corp., 163 FERC ¶ 61,236 at P 150 (emphasis added).

FERC further elaborated that, without a MOPR that applies to state-supported generators, "the PJM Tariff allows resources receiving out-of-market support to significantly affect capacity prices in a manner that will cause unjust and unduly discriminatory rates in PJM regardless of the intent motivating the support." *Id*. at PP 151-156. Thus, "the integrity and effectiveness of the [PJM] capacity market" would be "untenably threatened [absent the Expanded MOPR] by out-of-market payments provided by or

required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market." *Id.* at P 1.

C. FERC's default acceptance of the Focused MOPR.

Now, however, the agency has effectively reversed course—though not through any institutional action or majority vote of its Commissioners. On July 30, 2021, PJM submitted tariff revisions to FERC under Federal Power Act Section 205, proposing to replace the Expanded MOPR with what it called the Focused MOPR, which removes state-supported resources from the application of the MOPR in essentially all circumstances and thus undoes not only the Expanded MOPR orders but earlier MOPR orders going back more than a decade. *See generally* PJM Transmittal (JA __); *see also* Danly Statement ¶ 2 (JA __).[2]

At the time, FERC had only four sitting Commissioners, rather than the full complement of five. *See* 42 U.S.C. § 7171(b)(1). Those four sitting Commissioners could not reach a majority decision on PJM's proposed tariff

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[2] As Commissioner Danly explains, the Focused MOPR applies to state-supported resources only under circumstances in which the state subsidy in question would already be preempted by the Federal Power Act under *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), and thus does little independent work. *See* Danly Statement ¶¶ 45-47 (JA __-__).

revisions, because they were split 2-2 as to the legality of the proposal. September 29 Notice (JA __); *see* 42 U.S.C. § 7171(e) ("Actions of the Commission shall be determined by a majority vote of the members present.").

PJM's tariff revisions thus took effect by operation of law as the result of a 2-2 deadlock. September 29 Notice (JA __). And while individual Commissioners provided statements of their positions as required by the statute (16 U.S.C. § 824d(g)(1)(B); *see* Danly Statement (JA __-__); Glick Statement (JA __-__); Christie Statement (JA __-__)), the Commission itself—evenly divided for and against the proposal—issued no explanation for its action.

Multiple parties requested rehearing of the Commission's non-decision, but the Commissioners split 2-2 as to the rehearing requests as well. *See* November 29 Notice (JA __). Several parties therefore petitioned for review. *See* 16 U.S.C. § 824d(g)(2) (making 2-2 denials of rehearing appealable).

SUMMARY OF THE ARGUMENT

FERC's 2-2 default acceptance of the Focused MOPR must be set aside. That silent acceptance violated both the procedural protections of the Administrative Procedure Act and the Federal Power Act's substantive prohibition on discriminatory ratemaking.

I.A. To begin, the 2-2 default approval cannot withstand even the most cursory APA review, because the Commission itself—as opposed to individual Commissioners—gave no reasons for the agency's action. That is, having not issued an order that commanded a majority of Commissioners, FERC has not "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation marks omitted)), or satisfied any of the other components of the APA's reasoned-decisionmaking requirement. And having failed to supply any substantive reasons below, the Commission has no basis to defend its action on appeal. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Nor can the individual Commissioners' supporting statements stand in for Commission action, which by statute can only take place "by a majority vote of the members present." 42 U.S.C. § 7171(e). The default acceptance of the Focused MOPR must therefore be set aside for want of rational agency action.

B. Moreover, even if the supporting Commissioners' statements could be deemed to supply reasoning on behalf of the agency, those statements themselves fail to adequately consider and respond to "serious reliance interests" raised by the parties. *DHS v. Regents of Univ. of Cal.*, 140 S. Ct.

1891, 1913 (2020) (quotation marks omitted). Because "[i]t would be arbitrary and capricious to ignore such matters" (*id.* (quotation marks omitted)), the acceptance of the Focused MOPR must be set aside for this reason, as well.

II. The Focused MOPR also violates the Federal Power Act's substantive prohibition on "unduly discriminatory" rates (16 U.S.C. § 824e(a)), because it permits States to project their own generation policy preferences into other States through the FERC-regulated capacity markets.

Properly understood, the FPA's prohibition on "unduly discriminatory" rates incorporates principles of equal state sovereignty—well understood to inhere in the concept of discrimination when the FPA was enacted—providing that one State may not "project its legislation into" other States. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935). Relevant here, in regulating the interstate power markets, FERC must consider whether the design of the interstate market allows one State to unduly impose its policy preferences on another State, to the detriment of the second State's different policy choices.

The Focused MOPR violates this proscription because it establishes an interstate market that allows States to export the costs of subsidies through the PJM capacity market, thus rendering other forms of generation in other States—that have made different policy choices—not economically

viable. That is, the Focused MOPR permits state-subsidized generators to distort the multi-state PJM capacity market, thus interfering with the generation-mix policies of the other States in the market.

FERC here erred twice. It failed to even recognize its obligation under the FPA to assess the interstate markets for undue discrimination of this sort. And, apart from that procedural failing, FERC's adoption of the Focused MOPR is substantively unlawful.

STANDARD OF REVIEW

"In reviewing FERC's orders, the Court must determine … 'whether the Commission's order is arbitrary and capricious or not in accordance with the purpose of the FPA.'" *NJBPU*, 744 F.3d at 94 (quoting *Cities of Newark v. FERC*, 763 F.3d 533, 545 (3d Cir. 1985)) (alteration incorporated); *accord, e.g.*, *Verso Corp. v. FERC*, 898 F.3d 1, 7 (D.C. Cir. 2018) ("The courts review FERC's decisions under the familiar arbitrary-and-capricious standard of the Administrative Procedure Act.").

FERC flunks that arbitrary-and-capricious test when it fails to "respond meaningfully to the arguments raised before it," or otherwise fails to "engage in reasoned decisionmaking." *New England Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 210 (D.C. Cir. 2018) (quoting *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015)). Similarly, "[w]hen an agency changes course … it must be cognizant that longstanding

policies may have engendered serious reliance interests," and "[i]t would be arbitrary and capricious to ignore such matters." *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (quotation marks omitted). And the Court must set aside an agency action in contravention of the governing statute. *See, e.g.*, *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 327 (2014) ("The power of executing the laws … does not include a power to revise clear statutory terms.").

ARGUMENT

Under these standards, FERC's default acceptance of the Focused MOPR must be held unlawful and set aside. Not only does that acceptance fundamentally contravene the APA's procedural requirement "that agency action be reasonable and reasonably explained" (*e.g.*, *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)), but it also runs afoul of the FPA's prohibition on "unduly discriminatory" rates (16 U.S.C. § 824e(a)).[3]

[3] EPSA also adopts and incorporates by reference the separate arguments for vacatur pressed by Petitioner PJM Power Providers Group (P3) in its opening brief.

I. The Commission's failure to issue a decision here—in view of a deadlocked vote—violates the APA requirement of reasoned decisionmaking.

To begin, FERC's deemed action here—allowing the Narrow MOPR to take effect through its inaction—cannot survive review under the traditional APA standards, for multiple reasons. First, without any explanation for the Commission's action from the Commission itself, that action does not comply with the most basic requirement of administrative procedure: that an agency provide a reasonable explanation for its decisions. And second, even if the statements of individual supporting Commissioners can be imputed to the agency itself, those statements do not adequately respond to the reliance interests generated by the prior policy that the Commission has now abruptly abandoned.

A. The default acceptance results in a decision with no agency reasoning, requiring vacatur.

FERC's default acceptance of PJM's proposal does not represent reasoned decisionmaking by the agency, and therefore must be set aside under the APA.

1. At its most basic, the APA's arbitrary and capricious standard requires an agency to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463

U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *see* 5 U.S.C. § 706(1).

This principle encompasses an obligation to respond meaningfully to counterarguments and reasonable alternatives set forth either by the parties before the agency or—in the case of a multi-member body like FERC—by the dissenting Commissioners. *See, e.g.*, *New England Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 210 (D.C. Cir. 2018) ("It is well established that the Commission must respond meaningfully to the arguments raised before it.") (quotation marks omitted); *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 21 (D.C. Cir. 2010) (FERC "must, at a minimum, acknowledge and consider" "arguments raised by a dissenting Commissioner."). And it similarly requires FERC to "provide a reasoned explanation for departing from precedent or treating similar situations differently." *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) (alteration incorporated; quotation marks omitted); *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-516 (2009).

Here, FERC has done none of these things. Indeed, the agency itself—as opposed to individual Commissioners—has provided *no* explanation for its deemed action, and it is only FPA Section 205(g) that transforms FERC's non-action into reviewable agency action in the first place. 16 U.S.C.

§ 824d(g) (providing that FERC inaction on a Section 205 rate filing "because the Commissioners are divided two against two . . . shall be considered to be an order issued by the Commission accepting the change" for purposes of rehearing and judicial review); *see* September 29 Notice (JA __) (explaining that "the Commission did not act on PJM's filing because the Commissioners are divided two against two as to the lawfulness of the change," and providing no further reasoning).

That is, because FERC issued no order explaining its decision, it has neither "articulate[d] . . . a rational connection between the facts found and the choice made" (*State Farm*, 463 U.S. at 43); nor "respond[ed] meaningfully to the arguments raised before it" by the parties and Commissioners Danly and Christie (*New England Power Generators Ass'n*, 881 F.3d at 210); nor "provide[ed] a reasoned explanation for departing from" its prior MOPR orders (*W. Deptford Energy*, 766 F.3d at 20).

That last point bears special emphasis. As noted above, FERC in 2018 made an explicit finding that the Federal Power Act *requires* PJM's capacity auction structure to include a MOPR encompassing state-subsidized generators, in order for that structure to avoid being unjust and unreasonable (and therefore unlawful). *See Calpine Corp.*, 163 FERC ¶ 61,236 at PP 4-5 (finding that "PJM's Tariff is unjust and unreasonable" because "PJM's existing MOPR does not" "address the price suppressive impact of resources

receiving out-of-market support" from States); *id.* at P 150 ("We find . . . that PJM's existing Tariff is unjust and unreasonable and unduly discriminatory[] [because] [i]t fails to protect the integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market support to keep existing uneconomic resources in operation, or to support the uneconomic entry of new resources.").

Now, however, FERC has—through its inaction—allowed a rate structure to take effect that shares the exact feature that, in FERC's own estimation, made the pre-2018 tariff unlawful: a MOPR that does not address state-subsidized resources. *See Calpine Corp.*, 163 FERC ¶ 61,236 at P 150. That is, the "new policy rests upon factual findings" that directly "contradict those which underlay its prior policy." *Fox Television*, 556 U.S. at 515. In such circumstances, reasoned decisionmaking requires "a *more* detailed justification than what would suffice for a new policy created on a blank slate" (*id.* (emphasis added))—but FERC here has provided *no* explanation for the reversal of its own prior determination. That abject failure to abide by the most basic requirements of reasonable administrative decisionmaking requires reversal. *Id.*; *see also, e.g.*, *W. Deptford Energy*, 766 F.3d at 20 ("It is textbook administrative law that an agency must provide a reasoned explanation for departing from precedent.") (quotation marks omitted; alteration incorporated).

Moreover, because the *agency* itself has said nothing at all about any of the substantive issues, there is no reasoning *of the agency* that can sustain the agency action on appeal. It is foundational that a court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *CBS Corp. v. F.C.C.*, 663 F.3d 122, 137 (3d Cir. 2011) (quoting *State Farm*, 463 U.S. at 43). That is, "[i]t is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Facchiano Const. Co. v. U.S. Dep't of Lab.*, 987 F.2d 206, 215 (3d Cir. 1993) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Here, because the Commission gave *no* reasoning, it "articulated" no "basis" upon which its action may be upheld—and the agency thus has no grounds on which it may properly sustain its action against the challenges pressed on appeal.

Unless something about the unique review structure in Section 205(g) of the FPA changes these generally applicable APA standards, therefore, the Commission's deemed action plainly fails to satisfy those standards, and must be set aside.

2. FPA Section 205(g) does not require a different result. The statute provides that the Commission's "failure to issue an order accepting or denying" a rate filing on the grounds that "the Commissioners are divided two against two as to the lawfulness of the change . . . shall be considered to be an order issued by the Commission accepting the change" for purposes of

rehearing and judicial review. 16 U.S.C. § 824d(g).[4] The provision was enacted in 2018 (*see* Pub. L. 115-270, § 3006 (2018), 132 Stat. 3765, 3868-3869), and this case will be the first time an appeal under Section 205(g) is resolved on the merits. The proper construction of Section 205(g) is therefore a question of first impression here.

"We begin, as always, with the text of the law." *United States v. Ashurov*, 726 F.3d 395, 398 (3d Cir. 2013); *see also, e.g.*, *Da Silva v. Att'y Gen.*, 948 F.3d 629, 635 (3d Cir. 2020) ("If the statutory language is unambiguous, our inquiry ends because courts must presume that Congress says in a statute what it means and means in a statute what it says there.") (quotation marks omitted). By its own terms, the plain text of Section 205(g) does not purport to suspend the operation of the general APA principles requiring an unreasoned agency action to be set aside. That alone is enough to sink any contrary contention, since courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama v. ICE*, 543 U.S. 335, 341 (2005); *see also, e.g.*, *Romag Fasteners, Inc v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020) ("Nor does this Court usually read into statutes words that aren't there.").

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[4] The Commission has five seats; this section applies when there are only four Commissioners eligible to vote on a matter "as a result of vacancy, incapacity, or recusal," thus raising the possibility of a two-two deadlock. 16 U.S.C. § 824d(g).

Nor would such an atextual construction be consistent with the express purpose of Section 205(g), which is to permit judicial review that would otherwise be foreclosed. *Cf., e.g.*, *Abramski v. United States*, 573 U.S. 169, 179 (2014) ("[W]e must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose."). Section 205(g) was enacted as a direct response to a D.C. Circuit decision holding that FERC's deadlocked inaction on a rate filing, which allowed the new rates to take effect by operation of law, was unreviewable in court. *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016); *see* S. Rep. 115-278, at 2-3 (2018) (explaining the need for what became Section 205(g) in light of the *Public Citizen* decision), https://www.congress.gov/115/crpt/srpt278/CRPT-115srpt278.pdf. Indeed, as the House sponsor of the bill, Representative Kennedy, explained, the provision was intended to close "an unintended loophole in the Federal Power Act" that had "locked out" affected parties from challenging the rates at issue in *Public Citizen*. 164 Cong. Rec. H8227 (Sept. 18, 2018), perma.cc/3B7P-XDDH.

The purpose of Section 205(g) is thus to provide *more* judicial review than would otherwise be available, not less. Particularly given this liberalizing purpose, it would be irrational for petitioners to be placed in a *worse* position than normal when challenging a FERC action that could not even garner a majority of the Commissioners' votes.

Additional legislative history confirms that the provision means what it says, and nothing more. In particular, the Senate committee that favorably reported the bill that ultimately became Section 205(g) had before it testimony from FERC's general counsel—now-FERC Commissioner James Danly—explaining that the amendment would have exactly the result we propose. S. Rep. 115-278, at 7-8 (quoting Danly's testimony: "When sitting in review of agency action, Courts of Appeals review the evidentiary record compiled below and the reasoning the agency employed—as reflected in its orders—to support its decision based on that record. In the case of a serial 2–2 split, no orders would issue and such a review would be impossible. Remand would appear to be the Court's only option."). The fact that Congress ultimately passed a bill that FERC's own general counsel testified would result in nearly automatic vacatur and remand strongly suggests that that is precisely the result the legislature intended.

Moreover, while Section 205(g) requires each individual Commissioner to "add to the record … a written statement explaining the views of the Commissioner with respect to the change" (16 U.S.C. § 824d(g)(2)), it does not contemplate that those statements can stand in for a decision by the Commission itself, or provide the APA-mandated "reasonabl[e] expla[nation]" (*Prometheus Radio Project*, 141 S. Ct. at 158) for the agency's (in)action.

First, the language of Section 205(g) on its face does not purport to amend the normal statutory requirement that "[a]ctions of the Commission shall be determined by a majority vote of the members present." 42 U.S.C. § 7171(e). As FERC itself has repeatedly explained, therefore, "[i]ndividual Commissioners' statements reflect their personal views and do not reflect the views of the Commission as a deliberative body. The Commission speaks through, and only through, its orders." *Californians for Renewable Energy*, 175 FERC ¶ 61213, at P 13 (2021); *accord Pub. Citizen*, 839 F.3d at 1169 (noting "the 'almost universally accepted common-law rule' that only a "'majority of a collective body is empowered to act for the body.'") (quoting ***FTC*** *v. Flotill Prods., Inc.*, 389 U.S. 179, 183, (1967)). Nothing about the text passed by Congress calls that fundamental rule into question.

Again, the legislative history confirms this result. Both the Senate report and Representative Kennedy's sponsor statement explain that the individual Commissioners are required to commit their views to a publicly filed writing "for purposes of transparency and good government" and to facilitate deliberation and potential compromise among the Commissioners themselves. 164 Cong. Rec. at H8227 (statement of Rep. Kennedy); *see also* S. Rep. 115-278, at 3 ("Having the benefit of these [individual Commissioner] statements may discourage ties by highlighting more precisely the

reasoning that leads each Commissioner to his or her views and, consequently, to enable the fashioning of an order that could attract a majority vote."). Like the text, the history gives *no* indication that the Commissioner statements are required in order that the beliefs and reasons of a minority of the Commission be imputed to the agency as a whole, in contravention of the statutory and common-law principles discussed above. *Cf., e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law* 318 (2012) ("A statute will be construed to alter the common law only when that disposition is clear.") (collecting authorities).

The two Commissioners supporting FERC's non-objection to the Focused MOPR may very well find the result required by the text—that an unreasoned operation-of-law approval must be vacated and remanded—"head-scratching." Glick Statement at P 48 (JA __). But they identify no language in Section 205(g), or elsewhere, that would permit any other outcome. *Compare id. with* pages 20-25, *supra*. And of course, it is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014). If those Commissioners do not like the results of Congress's action, "it lies with Congress, not this Court, to provide the remedy." *Pub. Citizen*, 839 F.3d at 1174.

FERC may point to a line of D.C. Circuit cases that has attributed the reasoning of concurring members of the Federal Election Commission (FEC) to the agency as a whole for purposes of judicial review when that agency splits evenly. *See, e.g.*, *Pub. Citizen*, 839 F.3d at 1170-1171 (discussing this case law). As an initial matter, these cases are not binding on this Court, and Petitioners are not aware of any other circuit embracing the D.C. Circuit's logic or otherwise following this approach of relying on individual members' statements as a substitute for agency reasoning.

In fact, the D.C. Circuit has itself has criticized this approach as "a rather apparent fiction raising problems of its own" (*Citizens for Resp. & Ethics in Washington v. FEC*, 892 F.3d 434, 437-438 (D.C. Cir. 2018)), and has declined to follow it outside the FEC setting. In the case that prompted the enactment of Section 205(g), the D.C. Circuit expressly declined to apply its FEC approach to FERC, in part because of the structural differences between FERC and the FEC, which *always* consists of an even number of Commissioners and has a partisan-balance requirement, making this unusual treatment "uniquely . . . appropriate[]" for the FEC. *Pub. Citizen*, 839 F.3d at 1170. *See also Western Coal Traffic League v. STB*, 998 F.3d 945, 952 (D.C. Cir. 2021) (declining to extend FEC precedent in review of Surface Transportation Board order). This Court should not adopt it here.

What is more, such a reading of the statute—allowing the views of a single Commissioner to stand in for action by the Commission as a whole and thus gain the force of law—raises grave constitutional concerns, and should therefore be avoided. *See, e.g.*, *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1622 (2021) ("Courts should indeed construe statutes 'to avoid not only the conclusion that they are unconstitutional, but also grave doubts upon that score.'") (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)) (alteration incorporated); *Burton v. Schamp*, 25 F.4th 198, 212 (3d Cir. 2022) ("It is well settled that federal courts should avoid a statutory interpretation that creates constitutional issues.").

As the Supreme Court recently explained, the constitutional separation of powers does not permit an agency structure that "provide[s] good-cause tenure to principal officers who wield power alone rather than as members of a board or commission." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020). For this reason, the Court concluded that "[t]he CFPB's single-Director structure contravenes" the separation of powers "by vesting significant governmental power in the hands of a single individual accountable to no one," since that director is removable only for cause. *Id.* at 2203. In all, "[t]he CFPB Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional." *Id.* at 2204.

FERC Commissioners are similarly removable only for cause. 42 U.S.C. § 7171(b)(1) ("Members . . . may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office."). This arrangement is potentially constitutionally permissible because of an exception to necessity of at-will removal for members of multi-member commissions, first recognized in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). *See Seila Law*, 140 S. Ct. at 2199-2200 (discussing *Humphrey's Executor*); *id.* at 2203-2204 (CFPB's structure is unconstitutional because it "vest[s] significant governmental power in the hands of a *single* individual accountable to no one," "[w]ith no colleagues to persuade, and no boss or electorate looking over her shoulder") (emphasis added).

But if Section 205(g) is read to make the reasoning of a single Commissioner (or minority of Commissioners) attributable to the Commission itself, the very fact that distinguishes FERC from the unconstitutional CFPB is destroyed. That is, if the explanatory statement of the supporting Commissioners here can be elevated to carry the force of law despite failing to garner "a majority vote of the members present"—as required for true Commission action (42 U.S.C. § 7171(e))—then those Commissioners would "wield power alone rather than as members of a board or commission," and their enjoyment of "good cause tenure" would offend the separation of powers (*Seila Law*, 140 S. Ct. at 2201). At the very least, such a reading would

"create constitutional issues," and this Court therefore "should avoid" that "interpretation." *Burton*, 25 F.4th at 212; *accord Palomar-Santiago*, 141 S. Ct. at 1622.

In sum, because Section 205(g) does nothing to alter either the fundamental administrative-law principle that an agency action without accompanying reasoning cannot be sustained, nor the statutory and common-law rule that only the Commission itself, by majority vote, may speak for the Commission, FERC's admittedly unreasoned action here unavoidably must be set aside.

B. FERC has failed to adequately respond to petitioners' demonstration of substantial reliance interests.

Even setting aside the fundamental failing here—that the Commission itself has provided no reasoning for what amounts to a complete reversal of prior policy—FERC's default acceptance of the Focused MOPR proposal fails under the APA even if the reasoning of the supporting Commissioners is attributed to the agency as a whole. Specifically, those Commissioners provide no indication that they have meaningfully considered the reliance interests of interested parties as required by the APA.

It is a fundamental APA principle that "[w]hen an agency changes course, as [FERC] did here, it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into ac-

count.'" *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). As the Supreme Court has explained, "[i]t would be arbitrary and capricious to ignore such matters." *Id.* (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). But that is just what FERC has done here.

Indeed, the supporting Commissioners explicitly recognized that the parties had raised reliance interests before the Commission. Glick Statement ¶ 61 (JA __); *see, e.g.*, EPSA Rehearing 37-40 & n.154 (JA __-__) (raising this issue on rehearing before FERC). Specifically, the parties demonstrated that investors have sunk many billions of dollars into constructing new power plants and maintaining existing ones, all in reliance on the existence of PJM market mechanisms that ensure a competitive marketplace, rather than a marketplace skewed by the participation of un-economic resources, including those subsidized by the States. *See, e.g.*, CCE/SFE Protest 2-9 (JA __-__) (protest of specific companies that "relied on the longstanding commitment of PJM and the Commission to preserving the integrity of the [capacity] market, including an effective MOPR to protect against capacity price suppression by subsidized entities, when they made their investment decisions to develop, finance and construct their respective facilities"); *see also* EPSA Protest 64-69 (JA __-__) (similar); Cain Aff. ¶¶ 28-29 (JA __-__).

But rather than "take[]" those investment-backed reliance interests "into account" (*Regents*, 140 S. Ct. at 1913), the supporting Commissioners refused to consider them at all, on the purported grounds that "PJM's capacity market is very much an administrative construct with rules and regulations that are always subject to prospective change" (Glick Statement ¶ 61 (JA __)). *See also id.* ("The idea that any particular party has an entitlement to the maintenance of particular features of the market is inconsistent with the FPA, not to mention the history of PJM's capacity market, which has been in a state of flux in almost every significant respect since its inception."). That is, rather than weighing the reliance interests of companies that have invested billions of dollars in reliance on a functioning MOPR against what they viewed to be the benefits of rescinding the Expanded MOPR, the supporting Commissioners simply closed their eyes to the issue, claiming that any such reliance interests necessarily could not be "valid." *Id.*

Such a response—denying the validity of any reliance interests at the outset simply because policies are inherently subject to change, rather than considering those interests as an input to the ultimate decision—is incompatible with the agency's responsibility under the APA. Indeed, the Supreme Court has explicitly rejected the notion that an administrative pro-

gram's amenability to prospective change "automatically preclude[s] reliance interests." *Regents*, 140 S. Ct. at 1913. What is more, that holding was made in the case of a program whose founding document explicitly stated that it "conferred no substantive rights," and which "provided benefits [only] in two-year increments." *Id.* Yet instead of permitting the agency to blithely reject the relevance of any potential reliance interests at the threshold—as the supporting Commissioners have done here—the Court held that "because [the agency] was not writing on a blank slate, it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1915 (quotation marks and citation omitted).

Just so here. Because the supporting Commissioners rejected even the *potential* validity of any reliance interests at the outset, solely because PJM's tariff is not set in stone—rather than "assess[ing] whether there were reliance interests, determin[ing] whether they were significant, and weigh[ing] any such interests against competing policy concerns" (*Regents*, 140 S. Ct. at 1915)—they failed the core requirement to be "cognizant" of "reliance interests that must be taken into account" (*id.* at 1913).[5]

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[5] Contrary to the supporting Commissioners' apparent belief, this rule does not result in "any particular party [having] an entitlement to the maintenance of particular features of the market." Glick Statement ¶ 61 (JA __). Rather, what interested parties are "entitle[d] to" (*id.*) is a Commission

Of course, this is all beside the point given that, as described above, the reasoning given by the supporting Commissioners is *not* the position of the Commission itself. *See* pages 23-25, *supra*; 42 U.S.C. § 7171(e) (only a "majority vote" can constitute an "[a]ction[] of the Commission). And under the *Chenery* principle, only reasoning contemporaneously offered by the agency *itself* may be used to defend agency action in court. *Facchiano Const.*, 987 F.2d at 215 ("It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.") (citing *Chenery*, 332 U.S. at 196); *accord, e.g.*, *Rad v. Att'y Gen. of U.S.*, 983 F.3d 651, 666 (3d Cir. 2020) ("[O]ne of administrative law's most fundamental principles" is that "[w]e must judge an agency's decision solely on the grounds it invoked.") (quotation marks omitted; alterations incorporated). Having failed to garner a majority of the Commission, the reasoning of the supporting commissioners is *not* "the basis articulated by the agency itself" (*Facchiano Const.*, 987 F.2d at 215), and thus cannot justify the result reached here in any event.

The preceding discussion simply demonstrates that even if those Commissioners' reasoning *could* be imputed to the Commission itself, however,

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decision that takes their legitimate reliance interests into account when the agency abruptly changes course, as it has done here. *See Regents*, 140 S. Ct. at 1913. The Commission may always change its mind as a substantive matter, but *Regents* teaches that, when it does so, the agency must provide a reasoned, non-arbitrary basis for disregarding reliance interests. *Id.*

the Commission's decision must still be set aside for failure to adequately consider legitimate reliance interests under *Regents*, *Encino Motorcars*, and *Fox Television*. Either way, the default approval of the Focused MOPR cannot stand.

II. The Focused MOPR permits States to externalize the costs of their policy choices, resulting in discriminatory rates.

Apart from the arbitrary and capricious nature of the Commission's action below, the substance of that decision also violates the FPA's prohibition on "unduly discriminatory" rates. 16 U.S.C. § 824e(a). Properly understood, that prohibition incorporates principles of horizontal federalism most commonly associated with the dormant Commerce Clause, rejecting the notion that one State may project its laws and policies into other, equally sovereign States. In short, this provision does not permit FERC to approve a rate structure that would allow a "single State" to "impose its own policy choice on neighboring States." *BMW of N. Am. v. Gore*, 517 U.S. 559, 571 (1996).

But as multiple parties demonstrated below, the Focused MOPR at issue here would do just that. The Focused MOPR improperly allows one State to project its policy choices regarding the generation mix beyond its borders, dictating the generation mix that applies to other states. While a State is free to select the generation mix *within* its borders, the FPA does not permit interstate wholesale markets structured in a way that allows a

State to impose its preferred generation mix *outside* its borders, thus failing to respect other States' sovereign choices about their own generation mix. At the very least, the FPA requires FERC take this important interest into account when considering rate structures. Here, however, the Commission erred by denying that it even had such an obligation, and it compounded that error by failing to recognize that the Focused MOPR results in rates that qualify as "discriminatory."

1. The Supreme Court has long held that each of the States in the federal system are co-equal sovereigns, with none having a claim to authority over the others. As the Court once put it: "One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907); *see also, e.g.*, *Underwriters Nat. Assur. Co. v. N.C. Life and Acc. & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 704 (1982) ("[T]he structure of our Nation" is that of "a union of States, each possessing equal sovereign powers."); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1497 (2019) (the Constitution "transform[ed] . . . the States from a loose league of friendship into a perpetual Union based on the fundamental principle of *equal* sovereignty among the States.") (quotation marks omitted).

As such, no one State can impose its laws directly on another, or apply its laws outside its own sovereign territory: "Each State . . . can impose its

own legislation on no one of the others, and is bound to yield its own views to none." *Kansas*, 206 U.S. at 97; *see also Gore*, 517 U.S. at 571 ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular.") (quoting *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881)); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.").

Nor is this principle limited to directly extraterritorial regulation; instead, even some purely internal state actions may impinge on the policy choices of other states to such a degree that the constitutional structure will not tolerate it. For example, the Supreme Court in *Gore* held that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Gore*, 517 U.S. at 572. And in reaching that conclusion, the Court observed that "one State's power to impose burdens on [an] interstate market . . . is not only subordinate to the federal power over interstate commerce, but is *also constrained by the need to respect the interests of other States*." *Id.* at 571 (emphasis added; citation omitted); *see also id.* at 571-572 ("[T]he Constitution has a

‘special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce *and* with the autonomy of individual States within their respective spheres.’”) (quoting *Healy v. Beer Institute,* 491 U.S. 324, 335-336 (1989)); *cf. Hyatt*, 139 S. Ct. at 1497 (“Each State’s equal dignity and sovereignty under the Constitution implies certain constitutional ‘limitation[s] on the sovereignty of all of its sister States.’”) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)).

While seen in a variety of other contexts as well (*see, e.g.*, *Gore*, 517 U.S. at 572), this principle of non-interference with the sovereign prerogatives of other States is a foundational part of the Court’s dormant Commerce Clause jurisprudence, which—among other things—provides that “a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.” *Healy*, 491 U.S. at 336; *see also id.* (explaining that “[t]he critical inquiry” for application of this principle “is whether the *practical* effect of the regulation is to control conduct beyond the boundaries of the State”) (emphasis added); *id.* at 336-337 (“Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the

projection of one state's regulatory regime into the jurisdiction of another state.").

2. In crafting the Federal Power Act, Congress incorporated significant State-State non-interference principles into the Act's prohibition on "unduly discriminatory" rates. 16 U.S.C. § 824e(a). Accordingly, in regulating rates, FERC is required to reject rates and rate rules that permit one State to "impose its own policy choice on neighboring States" or otherwise intrude upon the "autonomy of [other] States within their respective spheres." *Gore*, 517 U.S. at 571 (quoting *Healy,* 491 U.S. at 335-336). That is, while a State is free to choose significant aspects of power policy within its own borders, FERC is obligated to ensure that interstate power markets do not operate such that one State can use those markets to project its policy preferences across those borders and into another State, supplanting that latter State's separate choices.

To begin, when the FPA was enacted in 1935 (*see* c. 687, tit. II, § 206 (1935), 49 Stat. 803, 852), Commerce Clause doctrine had for decades prohibited "local enactments *discriminating* against the products and citizens of other states." *Minnesota v. Barber*, 136 U.S. 313, 325 (1890) (emphasis added) (collecting cases); *see also, e.g.*, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 526 (1935) ("A state tax upon merchandise brought in from an-

other state . . . is lawful only when the tax is not *discriminating* in its incidence against the merchandise because of its origin in another state.") (quoting *Sonneborn Bros. v. Cureton*, 262 U.S. 506, 526 (1923)) (emphasis added); *cf. id.* at 521 (noting, in the same connection, that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."). Discrimination was thus a legal term of art that encompassed the kind of State-against-State policies at issue here.

Moreover, Congress had itself used the term in precisely that manner. In particular, the Interstate Commerce Act—originally enacted in 1887 and expanded in 1906—expressly prohibited "any undue, unreasonable, or unjust discrimination against interstate . . . commerce" specifically in the ratemaking context, and empowered the Interstate Commerce Commission to "prescribe" rates to replace those found to be discriminatory, in language similar to that employed by Congress in the FPA. 49 U.S.C. § 13(4) (1934); *see also La. Pub. Serv. Comm'n v. Texas & N.O.R. Co.*, 284 U.S. 125, 131 (1931) ("The Congress . . . has empowered the Interstate Commerce Commission to prescribe intrastate rates in place of those found *unduly to discriminate* against persons or localities in interstate commerce or against that commerce.") (emphasis added). In other words, Congress in 1935 well

understood that "discriminat[ion]" in ratemaking could encompass "intrastate rates" that discriminated against other States. *Id.*

What is more, the FPA itself was enacted to fill a regulatory gap created by a Supreme Court decision applying exactly these dormant Commerce Clause principles. *See Public Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). In *Attleboro*, the Supreme Court had held that Rhode Island's attempted setting of a rate for sales of electricity by a Rhode Island company to a Massachusetts company was "a direct burden upon interstate commerce, from which the state is restrained by the force of the commerce clause." *Id.* at 89. Thus, the Court held, "the rate is . . . not subject to regulation by either of the two states in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress." *Id.* at 90.[6] Congress closed this "*Attleboro* gap . . . by passing the FPA in 1935." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 266 (2016).

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[6] As the Court further explained:

> [I]f Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett

This was the jurisprudential context in which the FPA was enacted in 1935: "Discrimination" was a term of art widely used by both Congress and the courts to describe state action that unduly burdened either other States or interstate commerce itself; and the policy problem to which Congress was responding by passing the FPA was created by a Supreme Court decision applying precisely those principles.

Given that context, Congress naturally would have understood the textual prohibition on "discriminatory" interstate rates and practices in the FPA to include those that allow state actors to discriminate against interstate commerce—or, in slightly different terms, to "directly burden the prosecution of interstate business" or "project [state] legislation into" another State. *Baldwin*, 294 U.S. at 526; *cf, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law* 73 (2012) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

> Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character.

Attleboro, 273 U.S. at 90.

This construction also accords with the FPA's intent to preserve state authority over power generation, including the "[n]eed for new power facilities, their economic feasibility, and rates and services." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 205 (1983); *see Hughes v. Talen Energy Marketing LLC*, 136 S. Ct. 1288, 1292 (2016); *id.* at 1300 (Sotomayor, J., concurring) ("The Court . . . rightly recognizes the importance of protecting the States' ability to contribute, within their regulatory domain, to the Federal Power Act's goal of ensuring a sustainable supply of efficient and price-effective energy."). Indeed, any such "protect[ion]" of this state "regulatory domain" (*id.*) is incomplete if that domain is nevertheless vulnerable to the actions and policies of other States. *Cf., e.g.*, *Gore*, 517 U.S. at 571-572 ("[T]he Constitution has a 'special concern . . . with the autonomy of the individual States within their respective spheres.'") (quoting *Healy,* 491 U.S. at 335-336).

FERC must therefore play the role of federal referee for state intrusions into other States' jurisdiction, at least where the potential state overreach is accomplished through the instrumentalities of the FERC-regulated wholesale energy markets. At a minimum, the Commission cannot approve market rules that, by design, subordinate the policies of one state to those of another. In other words, the FPA is best read as incorporating and requiring FERC to enforce (within the limits of its jurisdiction) the principle

that "no single State" may "impose its own policy choice on neighboring States" through the interstate energy markets. *Gore*, 517 U.S. at 571.

In sum, the FPA's requirement that FERC set aside "discriminatory" rates or programs (16 U.S.C. § 824e(a)) imposes on FERC an obligation to ensure that the design of regulated interstate markets does not permit one State to "project its legislation into" other States. *Baldwin*, 294 U.S. at 526; *accord Healy*, 491 U.S. at 336-337.

3. EPSA and others demonstrated in their protests before FERC that the FPA's prohibition on discriminatory rates obligates FERC to ensure that one State cannot use the interstate power market to impose its policy preference on—and thus override the policy preferences of—another State. EPSA Protest 15-25 (JA __-__). As described above, the Commission—as distinct from individual Commissioners—did not respond, and its action must be set aside on that basis. *See* pages 16-29, *supra*; *New England Power Generators Ass'n*, 881 F.3d at 210 ("It is well established that the Commission must respond meaningfully to the arguments raised before it.").

However, even if the Court were to evaluate the views of the concurring Commissioners as if they belonged to FERC, vacatur is still necessary because the concurring Commissioners dismissed this legal contention out of hand. *See* Supporting Statement at PP 63-65 & n.141 (JA __). That is, the concurring Commissioners rejected the contention that the FPA obligates

FERC to act as a "federal check" on the ability of one State to use the interstate markets to govern the affairs of another state. *Id.* at n.141 (JA __). The concurring Commissioners, accordingly, did not attempt to argue that, if FERC has such an obligation, the Focused MOPR is nonetheless permissible. Thus, if the Court concludes—as it should—that the FPA's prohibition on discriminatory rates encompasses rate structures that permit one State to "project its legislation into" other States (*Baldwin*, 294 U.S. at 526), vacatur and remand are required. *See State Farm*, 463 U.S. at 50 ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

4. What is more, the Focused MOPR substantively violates this core principle, and therefore must be set aside for that reason, as well. In short, the Focused MOPR allows one State's subsidized preference for a particular generation mix to impact other States' ability to pursue their own preferred generating policies. This infringement occurs through artificially depressed auction prices that will ultimately push those other States either to subsidize their own preferred generators simply to keep pace, or to allow otherwise economic generators to retire prematurely.

FERC itself has previously explained the problem:

> Out-of-market payments, whether made or directed by a state, allow the supported resources to reduce the price of their offers into capacity auctions below the price at which they otherwise would offer absent the payments, causing lower auction clearing prices. As the auction price is suppressed in this market, more generation resources lose needed revenues, increasing pressure on states to provide out-of-market support to yet more generation resources that states prefer, for policy reasons, to enter the market or remain in operation. With each such subsidy, the market becomes less grounded in fundamental principles of supply and demand.

Calpine Corp., 163 FERC ¶ 61,236 at P 2.

As will undoubtedly be discussed in greater detail in the brief of Petitioners Pennsylvania Public Utility Commission and Public Utility Commission of Ohio, this concern is far from hypothetical. Indeed, parties presented evidence to the Commission that the Focused MOPR would have precisely this effect. *See generally* EPSA Protest 19-20 (JA __). As EPSA's expert explained below:

> When preference is given to subsidized resources over competitive ones in the administration of the capacity market, as would occur under PJM's weakened MOPR, revenue is transferred from economic resources, which may be pushed to exit the market entirely, to resources favored under one state's policies. The burden will be distributed across the PJM footprint, depending on where affected resources are located, and as noted, negative impacts will extend to employees and communities in non-subsidizing states where plants may be pushed to retire prematurely.

Cain Affidavit ¶ 44 (JA __).

The protests of concerned state officials were similarly put before the Commission, by the parties and by state officials themselves. *See generally* EPSA Protest 20-25 (JA __); PaPUC/PUCO Protest (JA __); Letter from Ohio State Senator Romanchuk (JA __); Letter from Ohio State Senators Huffman & McColley (JA __); Ohio Consumers' Counsel Comments at 2 (JA __). And the parties also introduced evidence of certain States expressing dismay that the Expanded MOPR was preventing them from *intentionally* projecting their generation-mix preferences beyond their own borders through the use of subsidies. *See* EPSA Protest 23-24 (quoting a report from the New Jersey Board of Public Utilities) (JA __). Of course, the Commission itself responded to none of these concerns. *See* pages 16-29, *supra*.

Nor would a ruling disallowing the Focused MOPR on these grounds infringe on the States' respective rights to support or subsidize their respective generators as they so choose. As this Court has previously explained in considering a prior version of the MOPR, "[t]he states may use any resource they wish to secure the capacity they need . . . but they will appropriately bear the costs of those decisions." *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 97 (3d Cir. 2014) (quoting *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009)) (quotation marks omitted). What they are not entitled to do is to externalize those costs, imposing their own policy preferences on unwilling States. Because the Focused MOPR would permit

exactly that kind of intrusion, it constitutes an “unduly discriminatory” rate structure under the FPA. 16 U.S.C. § 824e(a). FERC’s allowing the Focused MOPR to take effect must therefore be set aside for this reason, as well.

CONCLUSION

The petition for review should be granted. The Court should vacate the Commission’s default acceptance of the Narrow MOPR and remand the case to the Commission for further proceedings.

Dated: May 9, 2022

Respectfully submitted,

/s/ *Paul W. Hughes*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for Petitioner certifies that this brief:

(i) complies with Rule 32(a)(7)(B) and the briefing schedule approved by this Court (*see* Dkt. 101, 104) because it contains 10,563 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 365 and is set in New Century Schoolbook in a size equal to 14-point font.

Dated: May 9, 2022 /s/ *Paul W. Hughes*

CERTIFICATE OF SERVICE

I hereby certify that that on May 9, 2022, I filed the foregoing brief via the Court's CM/ECF system, which effected service on all registered parties to this case.

Dated: May 9, 2022 /s/ *Paul W. Hughes*